
CPI Competition Policy Institute

July 8, 1997

Mr. William Caton
Secretary
Federal Communications Commission
1919 M St. N.W.
Washington, D.C. 20554

CC DOCKET NO. 97-137

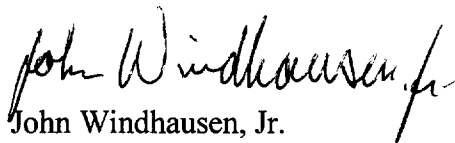
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Dear Mr. Caton:

Pursuant to section 1.41 of the Federal Communications Commission's Rules, 47 U.S.C. §1.41, the Competition Policy Institute (CPI) respectfully asks the Federal Communications Commission to accept the attached version of CPI's reply comments for filing in the above-captioned proceeding one day after the date for reply comments of July 7, 1997. CPI encountered unexpected difficulties with its internet provider that interfered with its ability to send electronic copies of the attached document between its office in Washington, D.C. and its office in Denver, Colorado. These difficulties made it impossible to file the document by the end of the day on Monday, July 7, 1997.

Attached to this document is a computer diskette with a copy of the proposed filing. Please date stamp and return one copy of this filing to CPI. Thank you.

Sincerely,


John Windhausen, Jr.
General Counsel

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Before the
FEDERAL COMMUNICATIONS COMMISSION
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OFFICE OF THE SECRETARY

In the Matter of)
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Application by Ameritech Michigan)
Pursuant to Section 271 of the)
Communications Act of 1934 to Provide)
In-Region, InterLATA Services in)
Michigan)
)
_____)

CC Docket No. 97-137

**REPLY COMMENTS OF THE
COMPETITION POLICY INSTITUTE**

Ronald Binz, President and Policy Director
Debra Berlyn, Executive Director
John Windhausen, Jr., General Counsel

Competition Policy Institute
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July 7, 1997

REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

I. INTRODUCTION

The Competition Policy Institute (CPI) respectfully submits these reply comments on the Application by Ameritech Michigan to provide in-region, interLATA services in Michigan. CPI is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers.

Like CPI's initial comments, these reply comments focus on the Commission's required findings under the public interest standard, particularly in relation to the comments submitted by the Department of Justice (DOJ). The DOJ's analysis confirms that consumers in Michigan do not yet have a realistic choice for local telephone service. What little competition Ameritech faces for local service today is heavily concentrated in two cities — Grand Rapids and Detroit. The overwhelming majority of consumers in Michigan, especially residential and small business consumers, cannot choose a provider of local telephone service other than Ameritech. The fact that consumers do not have a realistic choice for local telephone service means that the public interest will not be served by Ameritech's entry into the long distance market in Michigan. The Commission should find that the application fails the public interest test.

The DOJ asks why there is so little competition in Michigan and answers the question with reference to Ameritech's failure to meet the competitive checklist.

The DOJ's analysis, while important, is incomplete. Many additional factors affect the willingness and ability of local telephone competitors to enter a market, such as actions by municipalities and building owners and the availability of intraLATA toll dialing parity. The public interest test allows, indeed requires, the FCC to take these additional factors into account, if the standard is to have any meaning at all.

In particular, actions by several municipalities in Michigan are hindering the growth of local telephone competition, despite the recent passage of the Michigan Telecommunications Act. The issue has become so widespread that the Governor of Michigan has written to the cities expressing his concern with the actions by cities.

Under either the DOJ's "irreversibly opened to competition" standard, or CPI's "realistic choice" approach, these municipal barriers to competition are significant factors that rule against Ameritech's application. Granting Ameritech's application prematurely, before all barriers to local competition are removed or before consumers have a realistic choice of alternate providers, will harm the development of competition for both local and long distance service. Only when the local market is truly open to competition will the incentives to discriminate disappear and the benefits of Ameritech's entry into long distance flow through to consumers.

II. THE COMMENTS OF THE DOJ CONFIRM THAT CONSUMERS IN MICHIGAN DO NOT HAVE A REALISTIC CHOICE OF LOCAL TELEPHONE PROVIDERS.

In our initial comments, CPI described how the public interest test offers the FCC the opportunity to examine the Ameritech application from the perspective of consumers, rather than the perspective of the industry. Under the public interest standard, the FCC should use common sense to determine, on the whole, whether interLATA entry by Ameritech Michigan will benefit consumers. While the benefits to consumers of Ameritech's entry into the interLATA market should be taken into account in this analysis, the FCC should also give substantial weight to the question of whether consumers for local telephone service have a realistic choice of alternate providers. Today, the interLATA market is relatively competitive, while there is virtually no competition for local telephone service. Simply put, the benefits of delaying RBOC entry until the number of alternate local providers doubles is greater than the benefits of allowing a single significant new entrant into the market for interLATA services.

The comments of the DOJ confirm the validity of these two points: 1) that consumers will benefit more from the addition of one additional provider of local telephone service than the addition of one RBOC into the interLATA market, and 2) that Michigan consumers do not have a realistic choice of local telephone providers

today.

First, the Affidavit of Marius Schwartz explains that, while delaying RBOC entry into the interLATA market imposes certain costs on consumers, these costs are outweighed by the prospective benefits of achieving a more competitive local marketplace. Dr. Schwartz concludes that "in the long run, competition in integrated services is likely to be far more robust and performance thus superior if strong local competition emerges. That goal is better advanced by authorizing BOC entry only after the conditions of the [DOJ's] standards have been met." (Schwartz Affidavit, p. 57). Dr. Schwartz notes that "the BOC will more willingly supply to others its local services or inputs and on better terms if it is barred from long-distance and thus integrated services. As explained earlier, a BOC's incentives to promote such wholesale products increases if it is barred from selling, especially at unregulated prices, competing retail services." (Schwartz Affidavit, p. 57) Dr. Schwartz thus concludes that the "gains from injecting even a modest dose of local competition can thus easily outweigh those from adding one, albeit major, competitor into long-distance markets in a BOC's region." (Schwartz Affidavit, p. 54)

Dr. Schwartz's analysis confirms the notion that consumers will ultimately benefit most if they have available to them competitors for local telephone service before an RBOC is granted the right to provide interLATA service in that region.

Second, the DOJ's analysis of the competitiveness of the local exchange market in Michigan confirms that consumers in Michigan do not have a realistic choice of local telephone providers at this time. The DOJ states that

Ameritech remains, however, by far the dominant provider of local exchange services, with a near monopoly in its service areas. Most parts of Michigan still have no local competition, save possibly on a resale basis, since such CLEC competition as exists in Michigan is overwhelmingly concentrated in parts of the cities of Grand Rapids and Detroit and is primarily focused on business customers. (DOJ Comments, p. 32)

In its Appendix B, the DOJ provides further details. Competitors in Michigan currently serve between 70,000 and 80,000 of the state's consumers, amounting to between 1.2% and 1.5% of the total Michigan market.

Of course, market share figures indicate how many consumers have chosen to subscribe to an alternate provider. While the FCC is allowed to examine market share information as a part of its public interest analysis,¹ the more important factor is the number and type of consumers who have the ability to choose an alternative provider of local telephone service.

Ameritech argues that a large percentage of the Michigan population is "addressable" by competitors because of the number of lines served by end offices in

¹Congress considered and rejected provisions that would have established a "market share" test as part of the 271(c) preconditions. Congress did not, however, preclude the FCC from examining the market share of competitors as one factor, among several factors, in its public interest analysis.

which competitors have collocated. The DOJ refutes this argument:

Ameritech's "addressable market" argument assumes that CLECs have the "capacity to serve" all access lines served by collocated offices. *Id.* At 33. But capacity in this context is dependent not only on the capabilities of the CLECs, but also on the ability of Ameritech to provision unbundled loops in the collocated offices. Ameritech has not yet sufficiently demonstrated its ability to do so reliably and in significant volumes. (DOJ Comments, p. 37)

The DOJ also notes that, according to the data submitted by Ameritech, at the rate that Ameritech provided unbundled loops between January and March 1997, it would take 23 years to cut over just 20% of Ameritech's lines to competitors. (DOJ Comments, p. 37, note 49)

Clearly, the local telephone market is not competitive. Further, and most important, large numbers of consumers, in almost every category, do not have a choice for local telephone service today. The only groups of consumers who arguably have a choice today are the business customers in Grand Rapids and Detroit, plus small pockets of residential consumers. For the overwhelming majority of business and residential consumers in Michigan outside of those two cities, choice is a promise, but not a reality.

III. CITIES IN MICHIGAN ARE IMPOSING SIGNIFICANT BARRIERS TO LOCAL COMPETITION.

The DOJ notes that the limited amount of entry in Michigan suggests that some barriers to entry remain in Michigan. (DOJ Comments, p. 31) Its analysis of these barriers, however, is incomplete. The DOJ neglects to consider the effect that

municipalities have exercised on the openness of the Michigan market to local exchange competition.

In particular, a number of cities in Michigan have adopted restrictive ordinances that impede the growth and development of local telephone competition. The City of Troy, Michigan, for instance, has adopted a telecommunications ordinance that imposes unfair and overly regulatory requirements on new entrants. The Troy ordinance, currently the subject of an FCC proceeding, requires competitors to pay discriminatory fees not currently paid by the incumbent, Ameritech, imposes interconnection obligations on competitors, and subjects new entrants to a "most favored nation" clause that requires carriers to upgrade their facilities in Troy to the same quality they build elsewhere in Michigan.² At least one carrier, MCIMetro, has stated on the record that it chose not to provide competitive service in Troy because of the ordinance imposed by that city.³

The City of Troy is not alone in enforcing overly regulatory requirements on new entrants. The City of Dearborn, Michigan requires all new entrants to pay a

²See, File No. CSR-4790, TCI Cablevision of Oakland County, Inc.

³Even though several parties, including CPI, have asked the FCC to preempt the Troy Ordinance, the FCC need not decide whether preemption is warranted to find that actions by cities are discouraging competition as part of the FCC's public interest analysis of Ameritech's application to provide interLATA service in Michigan. In other words, even if the FCC chooses, for whatever reason, not to preempt the Troy ordinance under section 253 of the Communications Act, the FCC may still consider the harmful effect of the Troy ordinance on local competition in Michigan.

“franchise fee” that is “determined through a negotiated franchise fee procedure based upon the value of services for similar agreements and other pertinent factors.” (Section 1.10) This provision allows the city to withhold entry until a new entrant agrees to pay fees based upon the “value” of the rights-of-way, rather than the costs of maintaining the rights of way. It is alleged that the City of Dearborn has enforced this franchise requirement on new entrants but has not required the incumbent carrier, Ameritech, to obtain a comparable franchise.⁴

Similarly, the city of Sterling Heights, Michigan, requires telecommunications providers to interconnect with other telecommunications systems “as required by the City” (Section 48A-12), to pay fees even if they are reselling the lines of existing telecommunications providers (Section 48A-10(b)(3)), and to pay greater fees to Sterling Heights than required in the Sterling Heights ordinance if another city imposes and collects a greater fee.

The regulation by cities in Michigan of new entrants has caused the Governor of Michigan to write a letter to the Mayor of Troy expressing his concern that new fees imposed by cities would be “taxes that will be passed through to the ratepayer-plain and simple.” He expressed concern that “the collective actions a few [cities] could have the impact of paralyzing telecommunications infrastructure investments

⁴The Dearborn Ordinance is the subject of a lawsuit, TCG Detroit v. City of Dearborn, in the United States District Court of Eastern District of Michigan, Case No. 96-74338.

in our state, as well as in your own community.”⁵ Clearly, the Governor of Michigan agrees that the actions of these cities are hindering the growth of local telephone services in Michigan.

Some may ask why Ameritech’s application should be delayed because of actions taken by the cities, which are beyond Ameritech’s control. There are several reasons. First, to the extent that these municipal ordinances are being applied in a discriminatory fashion, Ameritech can voluntarily to subject itself to the same fees and regulations that cities are imposing on new entrants. In other words, this discrimination against competitors can, in fact, be rectified by Ameritech. Second, Ameritech can discourage cities from adopting these restrictive and discriminatory ordinances.

Third, and most fundamental, in its public interest analysis the FCC should consider the overall state of local competition and the effects of all barriers to competition, whether or not they are within the control of Ameritech. With only one exception that does not apply in this case, Congress expected some degree of local competition to exist before any RBOC received interLATA authority.⁶ As CPI has

⁵CPI will be pleased to submit copies of these ordinances and the letter from the Governor of Michigan in the record of this proceeding upon request.

⁶The lone exception to this rule is covered by section 271(c)(1)(B), the so-called “Track B”. The FCC has ruled in its decision to deny the Application of SBC Communications to provide service in Oklahoma that this Track B exception is extremely narrow. In any case, Ameritech

pointed out in its initial comments, many factors affect the growth of local competition other than the actions taken by the RBOCs to open their networks to competition. The actions by the RBOCs to satisfy the preconditions for interLATA entry are encompassed within section 271(c). If the public interest test has any meaning at all, it must allow the FCC to consider all other factors affecting the growth of local telephone competition in addition to the factors under the RBOCs' control to open their networks to competition.

Consumers are likely to obtain the benefits of interLATA entry by Ameritech only if they have an ability to choose an alternative local provider. If consumers have the ability to choose an alternate provider, Ameritech will have significantly less incentive and ability to subsidize its long distance offerings with higher local telephone rates. If consumers have the ability to choose an alternate provider, Ameritech is less likely to attempt to discriminate against other long distance providers, as the other long distance companies will have an alternative means of reaching the consumer. Finally, if Ameritech is facing some amount of competition for local service, Ameritech is more likely to flow through the benefits of greater efficiencies to consumers from its entry into the long distance market. In short, delaying Ameritech's entry into the interLATA market until these local barriers are

has submitted this application under Track A, not Track B. See, Memorandum Opinion and Order, CC Docket No. 97-121, June 26, 1997.

eliminated will, in the long run, benefit competition for both interLATA and local telephone services.

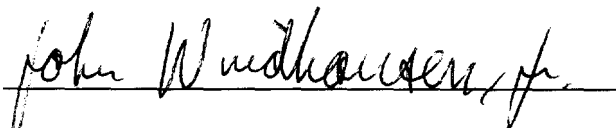
IV. CONCLUSION

The submission of the DOJ supports many of the views expressed by CPI in its initial comments. The DOJ submission confirms that consumers will benefit more from delaying Ameritech's interLATA entry until consumers have a realistic choice of local telephone providers. The DOJ's comments also support the view that Michigan consumers today do not have such a choice. Finally, the DOJ properly suggests that barriers to local competition continue to exist in Michigan. The DOJ's analysis of those barriers is incomplete, however, because it fails to discuss the critical role that municipalities in Michigan play in the development of local competition. In this case, several cities in Michigan are enforcing restrictive local ordinances that discriminate against new entrants and impose excessive regulatory fees and other requirements. The FCC should strongly consider these municipal barriers to competition in its public interest analysis because they affect the degree to which the public interest is served by Ameritech entering interLATA markets.

Reply Comments of CPI
Application of Ameritech Michigan
July 7, 1997

Because consumers in Michigan do not yet have a realistic choice of alternate local telephone providers, the Commission should find that Ameritech's application to provide interLATA service in Michigan does not satisfy the public interest test at this time.

Respectfully Submitted,

A handwritten signature in cursive script, reading "John Windhausen, Jr.", written over a horizontal line.

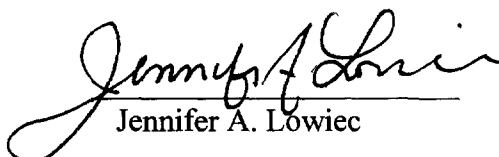
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July 7, 1997

Certificate of Service

I, Jennifer A. Lowiec, hereby certify that copies of the foregoing Reply Comments of the Competition Policy Institute were served this 8th Day of July, 1997, to the parties of record.


Jennifer A. Lowiec

July 8, 1997

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